

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000007-001 DT

05/17/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
T. Melius
Deputy

C I C EQUITIES

MARK A TUCKER

v.

CATHERINE A KELLEY (001)
DAVID L KELLEY (001)

JESSE D COOK

DREAMY DRAW JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No.: CC2010481171FD

Defendants Appellants (Defendants) appeal the Dreamy Draw Justice Court's determination they were guilty of forcible detainer for breaching the lease by feeding stray cats. Defendants contend the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

Defendant leased space at Plaintiff's Mobile Home Park. The lease¹ contained specific provisions about rules and regulations and the Rules and Regulations contained specific rules about pets and stray cats.² The "pet provision" states:

PETS: A POLICY OF MODERATION WILL PREVAIL. TENANTS WHO HAVE BEEN GIVEN PERMISSION TO HAVE A PET OR PETS ARE RESPONSIBLE FOR MAINTAINING THEIR SPACE IN A CLEAN CONDITION. EXCREMENT MUST BE REMOVED FROM THE GROUNDS AND PLACED IN A SEALED GARBAGE BAG.PET OWNERS WILL BE HELD RESPONSIBLE AND LIABLE FOR THE CONDUCT OF THEIR PETS.

¹ Plaintiff's Exhibit 1, ¶ 23. This paragraph specifically states the Rules and Regulations are part of the rental agreement.

² Plaintiff's Exhibit 2, Phoenix North Mobile Home Park Rules and Regulations.

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The “stray cat” provision states:

STRAY CATS: Stray cats are NOT to be fed by the tenants. For anyone wishing to remove stray cats, a humane cat trap will be furnished by the management.

Both prior to and during trial Defendant agreed that she fed the feral cats³ on the property. Defendant stated the cats were not pets but she was involved in a trap, neuter, release (TNR) program to help reduce the feral cat problem in the neighborhood. Plaintiff testified other tenants complained about the feral cat problem and she held a meeting⁴ with Defendant advising her of the problems associated with Defendant’s feeding stray cats. Plaintiff sent Defendant a “1430” notice,⁵ which Plaintiff followed with a July 1, 2010, non-waiver agreement.⁶ The Non-Waiver Agreement states:

I agree to cure the following described matter, which is a material violation of my lease agreement: On Saturday, June 19th, 2010 we met at my office in Phoenix North and you, (Catherine A. Kelly) agreed to feed the ferrel [sic] cats outside of the park and that we would continue to trap the cats and take them to the Humane Society or find homes for them at various ranches in Arizona.

Plaintiff was attempting to trap the stray cats, but admitted she was not successful in her efforts.⁷ Plaintiff contended Defendant contributed to the feral cat problem by feeding the animals, in violation of the terms of her lease.

Defendant admitted she continued to feed the cats for almost 2 months after the July 1 Non-Waiver Agreement and did not completely cease her feeding activities until August 31, 2010.⁸ Defendant also testified about her motives in feeding stray cats and spoke about her attempts to locate other feeding locations. Defendant maintained she was unable to find any other location that would be safe for the cats or her. Defendant further testified she attempted to contact Plaintiff to update Plaintiff about Defendant’s efforts in trapping the cats but was not successful in meeting with Plaintiff. Defendant stated Plaintiff agreed to continue to trap the cats but Plaintiff did not do so.⁹

At the conclusion of the case, Plaintiff moved to add Defendant’s husband and co-resident, David Kelley, as a named party. David Kelly agreed to this but Catherine Kelley objected. After considering the Summons—which was directed to Catherine Kelley and “any and all occupants” and determining David Kelly was an occupant—the Court added Mr. Kelley as a named party. The trial court found Defendants guilty of forcible detainer. Defendants filed a

³ Letter in response to Case No. CC20104817. The parties used the terms stray cat and feral cat interchangeably.

⁴ Audio recording of September 7, 2010, bench trial 3:19 to 3:22.

⁵ *Id.* at 3:22; Plaintiff’s Exhibit 7.

⁶ *Id.* at 3:24.

⁷ *Id.*, at 3:31.

⁸ *Id.*, at 3:53.

⁹ *Id.*, at 3:56.

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timely appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did the Trial Court Err by Adding David Kelley as a Party to the Proceeding.

Plaintiff moved to add David Kelley as a named party to the action at the beginning of trial.¹⁰ At that time, Defendant made no objection. The court did not rule on the motion and Plaintiff renewed the request after the testimony of all of the witnesses. David Kelley agreed with Plaintiff's request but Catherine Kelley opposed the request claiming David Kelley was unemployed and indigent.

In the appeal, Defendants raise—for the first time—the claim Defendant David Kelley lacked the opportunity to defend as he was notified that he would be added to the Judgment at the end of the trial. This misstates the evidence. Defendant was notified of Plaintiff's intent to add him as a party at the beginning of trial when the Court was discussing the import of “The Rule.” David Kelley did not object then—or ever—to Plaintiff's request that he be added as a party. Additionally, the Summons was listed for Catherine Kelly and “any and all occupants.” He was an occupant both at the time of trial and when the documents were served on Catherine Kelly. He did not assert any claim about being unprepared for trial, or not being given the opportunity to defend himself. As he did not raise this claim before the trial court, he cannot now raise it for the first time before the appellate court. Issues not raised at trial and not briefed are deemed to be abandoned. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989)

Catherine Kelley did object, but she is not able to represent another and cannot make a claim on behalf of a co-defendant. Furthermore, Defendants did not properly brief this issue on appeal as Defendants failed to cite to any legal authority. Consequently, Defendants' appellate memorandum fails to comply with Rule 8(a) (3), Super. Ct. R. App. P.—Civil, on this issue.

Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

It is usually not enough merely to mention an argument. Briefs must present significant arguments supported by authority setting forth the appellant's position on the issues raised. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). Furthermore, unless there is fundamental error, allegations lacking specificity or reference to the record do not warrant consideration on appeal. *State v. Cookus*, 115 Ariz. 99, 104, 563 P.2d 898, 903 (1977). In civil cases, fundamental error is rare. See *Monica C. v. Arizona D.E.S.*, 211 Ariz. 89, 118 P.3d 37, ¶ 23 (App. 2005). See also *Bradshaw v. State Farm Mutual Automobile Ins. Co.*, 157 Ariz. 411, 420 758 P.2d 1313, 1322 (1988) (doctrine of fundamental error in civil cases may be limited to those

¹⁰ *Id.*, at 3:06.

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instances when a party was deprived of a constitutional right.) Although Defendant David Kelley may have had a right to advance notice, he waived that right in the courtroom and his co-defendant cannot assert that right on his behalf.

Defendants assert David Kelley cannot be responsible as a tenant as he did not sign a rental agreement. Defendants cite A.R.S. §33-1476(D)(1) as authority for this position. A.R.S. §33-1409(29) defines tenant as “a person signing a rental agreement or otherwise agreeing with a landlord for the occupancy of a mobile home space.” The lease,¹¹ however, provides the space may be used for a mobile home “housing not more than two persons.” Accordingly, Plaintiff leased the space for the mobile home but allowed more than one resident to live in that mobile home. The lease further provides¹² if more than one Tenant is designated, the liability will be joint and several but “if such parties are husband and wife, community and separate.” If the Kelleys are married, there is community and separate liability and the marital community is responsible for any debt. Consequently, even if David Kelley is not or was not a tenant under the terms of the Arizona Mobile Home Parks Residential Landlord and Tenant Act, he would be a necessary party under community property law and therefore could be named in the litigation.

B. Did Defendants Materially Breach the Lease by Feeding Stray Cats in Order To Trap, Neuter, and Release These Animals

A landlord has the right to terminate a lease if the tenant breaches a material covenant. *M. Karam & Sons Mercantile Co. v. Serrano*, 51 Ariz. 397, 407, 77 P.2d 447,451 (1938); *City of Phoenix v. Bellamy*, 153 Ariz. 363, 365, 736 P.2d 1175, 1177 (Ct. App. 1987). This premise has been reiterated with the Arizona Supreme Court holding it will enforce a forfeiture if the lessee violates any material covenant of the lease. Additionally, the Arizona Mobile Home Parks Residential Landlord and Tenant Act, A.R.S. § 33-1476(D) (1) provides leases are subject to termination by a landlord for “material noncompliance by the tenant.”

If there is a material noncompliance by the tenant with the rental agreement, the landlord shall deliver a written notice to the tenant specifying the acts and omissions constituting the breach

Similarly, A.R.S. §33-1476(D) (2) provides remedies if there is noncompliance by the tenant with section 33-1451 that is “materially affecting the health and safety” of the mobile home park. Here, the lease specifically stated tenants shall not feed stray cats. Plaintiff and Plaintiff’s witness testified about numerous complaints by mobile home park residents about damage to property, cat urination or spraying, and fleas.¹³ Defendant, by her own admission, violated the “no feeding” provision on several, if not many, occasions. Although Defendant’s motives may be

¹¹ Plaintiff’s Exhibit 1, provision 9.

¹² *Id.*, provision 24(a)

¹³ Audio recording at 3:35-3:37.

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laudable and an effort to humanely remove a problem with stray cats, this case does not deal with motivations. The case deals with a material breach of the lease.

Under the specific lease terms, Defendant was to approach management for a humane cat trap and not engage in stray cat feeding. The court recognizes that Defendant had a history of self help and involvement with a “trap, neuter, release” program. However no matter how noteworthy the program, or how valiant the motivation, the tenant cannot avoid the fact she breached her lease agreement. New management had the right and the ability to require specific enforcement of the lease terms. Management gave her several warnings about her activities. Defendant ignored these warning and continued her activities.

Defendant next asserts her conduct was a trivial and not a material breach of the lease. Here Defendant relies on *Bolon v. Pennington*, 6 Ariz. App. 308, 432 P.2d 274 (Ct. App. 1967) and *City of Phoenix v. Bellamy*, 153 Ariz. 363, 736 P.2d 1175 (Ct. App. 1987). In these cases, the courts found material breaches of a lease when tenants either failed to pay taxes (*Bolon, id.*) or committed a felony (*City of Phoenix, id.*). In ruling against the tenants, the court stated the following:

The principle of law set forth in *Karam*, which has been consistently upheld, also applies here—courts will enforce a lease forfeiture if a tenant violates a provision of the lease,. Although our courts have not addressed the specific question of whether a single violation constitutes a material breach, their emphasis has been on whether any violation or breach occurred, rather than on the frequency of violations or breaches.

City of Phoenix, 153 Ariz. at 367. Here there were many violations—not just one. Here, too, the violations could and did pose a hazard to the human population in the area by exposing other tenants to fleas and odorous conditions. These are material violations and not trivial offenses.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Dreamy Draw Justice Court was correct in finding Defendants guilty of forcible detainer.

IT IS THEREFORE ORDERED affirming the judgment of the Dreamy Draw Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Dreamy Draw Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS

JUDICIAL OFFICER OF THE SUPERIOR COURT

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